No. 10,687

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STOCKTON SAND AND CRUSHED ROCK COMPANY, INC. (a corporation),

Appellant,

vs.

JAMES R. BUNDESEN, HOWARD F. LAURITZEN, and BUNDESEN & LAURITZEN (a copartnership),

Appellees.

BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEES.

The questions presented by this record are very largely questions of fact. The trial Court heard and saw all of the witnesses, except one. The findings of fact thereafter made by the trial Court resolved the conflict in the testimony of the witnesses in favor of appellees. The record will show that the evidence amply supports such findings of fact. No controversial nor unsettled principles of law arise upon the facts established by the findings.

I.

STATEMENT OF THE CASE.

On the 14th day of May, 1941, appellant and appellee Bundesen & Lauritzen made and entered into an oral agreement for the services of appellant's derrick barge "FOY NO. 2" as follows:

Appellant agreed to furnish to said appellee Bundesen & Lauritzen the services of the derrick barge "FOY NO. 2" in connection with the construction of an outfall sewer by said appellee for the United States Navy near Vallejo, California. Appellant agreed to furnish the services of the said barge until the completion of said construction work provided appellee found that the barge was suitable and capable of performing the contemplated services. Appellant agreed to furnish the services of said barge as aforesaid for the charge of $10.00 per hour of actual use with a minimum charge for four hours on any day the barge was steamed up. Appellant agreed to furnish and to include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Appellant stated that the said barge was fully insured and agreed to keep the barge fully insured. Appellee Bundesen & Lauritzen agreed to pay said hourly charge for the services of said barge for each hour of actual use with the minimum charge as aforesaid. Said appellee also agreed to pay the wages of the operator and fireman for any time, after said minimum of four hours, short of eight hours per day, as the operator and fireman had to be paid for a minimum of eight hours on any day they worked. Appellee also agreed to pay appellant for towing the said barge to and from the place of appellee's con-

struction work. (Finding of Fact III, Ap. 226-227; testimony, Ap. 89, 168-170, 175, 183.)

On May 15, 1941, appellant towed said barge from Oakland, California, to the place of appellee's construction work on the Napa River; that thereupon appellant informed appellee that appellant would be unable to furnish its operator and fireman to operate the barge and requested appellee to secure a crew to operate the barge for appellant and to deduct the wages of such crew from the hourly charge for the services of the barge. Appellee, pursuant to such request, sent D. E. Williams and Adrian A. Westall, as operator and fireman, respectively, to operate the barge for appellant. Williams and Westall operated the barge on May 16, 19 and 20, 1941, and were paid by appellee who deducted their wages from the amount due from appellee to appellant for the services of the barge. (Finding IV, Ap. 227; testimony, Ap. 172, 198. Respondents' Ex. E, Ap. 96.)

On May 21, 1941, a fire occurred on board said barge, causing considerable damage. The fire occurred while fireman Westall was engaged in getting up steam on the boiler. The fire resulted from an explosion in the firebox and spread rapidly over the barge. (Ap. 47-49, Libelant's Ex. 5, Ap. 210-212.)

The trial Court found that the explosion was caused by the failure of the equipment of the barge to function properly and by reason of defective fuel oil and that it was not due to any negligence on the part of Westall or on the part of appellees. (Finding V, Ap. 228-229.) The evidence supporting such finding will be discussed later herein.

Shortly after the fire had occurred on the barge, appellant sent to appellee a bill dated May 21, 1941, for the services of the barge on May 16, 19 and 20, 1941, in the sum of $315.00. The bill contained the following note: "Derrick destroyed by fire 5.00 A.M. May 21st. Additional charge will be made for towing hull to Greenbrae when released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire." (Respondents' Ex. A, Ap. 88.)

Appellee promptly returned said bill to appellant with a letter in which appellee set forth the terms of the oral agreement for the use of the barge and denied any liability for damage to the barge under the terms of the oral agreement. (Respondents' Ex. B, Ap. 89, 171.) Appellant made no reply questioning the statement of the oral agreement set forth in said letter. (Ap. 91.) However, appellant thereupon sent a new bill to appellee also for the sum of $315.00 for the services of the barge, but omitting the note set forth above relative to the fire. (Respondents' Ex. C, Ap. 93, 171.) Appellee then paid the bill (Respondents' Ex. C), deducting therefrom, as had been agreed, the wages advanced to the fireman and engineer. (Respondents' Ex. D, Ap. 94, 171.)

Appellant admittedly informed appellee when the oral agreement was made that the barge was fully insured. (Ap. 84, 100.) The barge was insured for an agreed value of $12,000.00, which amount was paid to appellant by the insurers for the damages arising to the barge by reason of the fire. (Ap. 106.)

II.

QUESTIONS INVOLVED.

Appellant has not accurately set forth the questions involved on this appeal. Appellant overlooks that the issues were determined against it by the trial Court on conflicting testimony.

This appeal does not involve a consideration of conflicting or unsettled principles of law. The applicable law is well settled. Therefore, the following propositions may be definitely set forth to the Court:

1. The finding of the trial Court that the barge was fully insured, that appellant agreed that the hourly charge would include the cost of insurance, and that it would keep the barge fully insured clearly precludes any recovery by appellant for any damage to the barge caused by fire, irrespective of whether the fire was due to alleged negligence on the part of appellee or not. (Findings III and VII, Ap. 226, 230.)

2. The finding that the damage was due to unseaworthiness of the barge's equipment and was not due to any negligence on the part of appellee, requires a decree for appellees irrespective of whether the oral agreement constituted a demise charter or a charter for the services of the barge. (Finding V, Ap. 228-229.) The essence of appellant's case in either event is proof that the damage resulted from negligence on the part of appellee.

3. The finding that Westall, the fireman, was the employee of appellant in operating the barge requires a decree for appellees, for the only negligence charged is based on the acts of Westall. (Finding IV, Ap. 227-228.)

The issue presented on this appeal is, therefore, whether or not there is evidence to support the findings of the trial Court. In other words, is there plain error in the findings of fact made by the trial Court?

III.

THE FINDINGS OF THE TRIAL COURT ARE ENTITLED TO GREAT WEIGHT AND SHOULD NOT BE DISTURBED EXCEPT FOR PLAIN ERROR.

Appellant states that it is entitled to a trial *de novo* and for that reason apparently expects this Court to review all the evidence, weigh the evidence, evalute the evidence, determine the credibility of the witnesses and give little weight to the findings of the trial Court.

The judge below heard and saw all of the witnesses, except one. The one exception was Westall, the barge fireman, who testified by deposition. He was alone on the barge on the morning of the fire and his testimony relates almost wholly to his actions at that time. The conflict in the testimony was not between Westall and the other witnesses, but the conflict was in the testimony of the witnesses heard and seen by the judge below.

Under these circumstances the applicable rule is set forth in *The Heranger*, 101 F. (2d) 953, 957 (9 C.C.A.):

> "This Court has adhered to the rule that findings and conclusions of the District Court in an admiralty case will be affirmed on appeal, unless the record discloses some plain error of fact or misapplication of some rule of law."

The other circuits follow the same rule. In *Hodges v. Standard Oil Co.,* 123 F. (2d) 362, 363 (4 C.C.A.), the Court said:

> "There is no better established principle of admiralty law than that questions of fact, resolved by a trial judge on conflicting evidence, are entitled to great weight and will not be reversed except for plain error."

In *Johnson v. Andrus,* 119 F. (2d) 287, 288, the Second Circuit Court of Appeals said:

> "While it is true that Admiralty Rule 46½, 28 U.S.C.A., following section 723, does not declare that the findings of a judge shall have the same weight in the admiralty as in other civil causes (Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A., following section 723c), there should be no difference and they are to stand unless 'clearly erroneous'."

So, in *M. & J. Tracy, Inc., v. Sound S.S. Lines, Inc.,* 140 F. (2d) 532, 534, Judge L. Hand said:

> "The appeal is another illustration of what apparently it is so hard for the bar to accept: that, in cases where the judge has seen all the witnesses, we will ordinarily resolve disputed questions of fact in favor of his findings."

The authorities are reviewed in *Petterson Lighterage & T. Corp. v. New York Central R. Co.,* 126 F. (2d) 992, 994 (2 C.C.A.).

The above authorities are particularly applicable in this case where the credibility or recollection of various witnesses was a matter which the trial judge necessarily determined.

> *Crowley Launch & T. Co. v. Wilmington Transp. Co.,* 117 F. (2d) 651, 653 (9 C.C.A.).

IV.

APPELLANT'S ASSIGNMENT OF ERRORS IS INSUFFICIENT.

The assignments of error made by appellant merely state in effect that the Court was wrong in its holdings and conclusions. Appellant has failed to indicate in what respect or for what reason the findings or conclusions of the Court are claimed to be in error. Such assignments of error are manifestly insufficient.

American Surety Co. v. Fischer Warehouse Co., 88 F. (2d) 536, 538-539 (9 C.C.A.).

Thus, appellant's assignment of errors numbers 1, 2, 3, 4, 5 (Ap. 236) merely state that the Court erred in failing to make certain findings. Appellant does not state why or in what respect the Court erred in failing so to find.

Appellant's assignments of error numbers 7, 8, 9, 10 and 11 (Ap. 236-238) likewise state that the Court erred in making certain findings without indicating the respect or reason why such findings are in error.

Assignment of errors numbers 6, 12, 13, 14, 15 and 16 (Ap. 236, 238-239) are merely statements that the Court erred in entering a decree for appellees and in making certain conclusions of law. Such assignments have repeatedly been held to be too general for consideration.

American Surety Co. v. Fischer Warehouse Co., supra;

Humphreys Gold Corp. v. Lewis, 90 F. (2d) 896, 898 (9 C.C.A.).

Thus, none of appellant's assignments of error comply with Admiralty Rule 3 of this Court.

V.

SUMMARY OF ARGUMENT.

The decree of the District Court dismissing the libel is correct because:

1. Appellant assumed the risk of loss to its barge by fire by its agreement that the barge was fully insured, that such insurance would be kept in force and that the cost of the insurance was included in the hourly charge for the services of the barge.

2. Appellant, having agreed to furnish and pay the crew of the barge, was responsible for their acts in the normal operation of the barge.

a. Appellant agreed to furnish the crew for the barge and was responsible for their actions in the ordinary operation of the barge.

(1) Appellant had and exercised full control over the crew in the ordinary operation of the barge.

b. Appellee did not have possession, control or management of the barge.

c. The contract between the parties did not constitute a demise of the barge.

3. The damage to the barge was not caused by negligence on the part of the fireman but was due to the failure of the equipment of the barge to function properly or to defective fuel oil.

a. Westall, the fireman, was not negligent.

b. The fire and resulting damage to the barge was due to the failure of the equipment to function properly or to defective fuel oil.

VI.

APPELLANT ASSUMED THE RISK OF LOSS TO ITS BARGE BY FIRE BY ITS AGREEMENT THAT THE BARGE WAS FULLY INSURED, THAT SUCH INSURANCE WOULD BE KEPT IN FORCE AND THAT THE COST OF THE INSURANCE WAS INCLUDED IN THE HOURLY CHARGE FOR THE SERVICES OF THE BARGE.

Appellees will discuss the above point first because the finding and conclusion of the trial Court on this issue is alone sufficient to support the decree dismissing the libel.

The District Court found as follows:

> "* * * Libelant agreed to furnish and include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Libelant stated that the said barge was fully insured and agreed to keep the barge fully insured. * * *" (Finding III, Ap. 227.)

> "Libelant informed respondents at the time the oral agreement for the services of said barge was made that said barge was fully covered by insurance. Libelant did have and kept in force at all times herein mentioned policies of marine insurance on said barge in which said barge was insured and valued for the sum of $12,000.00 against loss or damage by fire and other specified perils. Libelant made claim upon the insurers for loss by reason of the fire occurring on said barge on May 21, 1941, and pursuant to such claim received payment from said insurers of the sum of $12,000.00." (Finding VII, Ap. 230.)

The Court made the following conclusion of law based on the foregoing findings:

> "Libelant, by agreeing with respondents to keep said barge fully insured and to include the cost of

insurance in the hourly charge for the services of the barge, assumed the risk of loss to said barge by fire and other usual marine risks." (Conclusion of Law IV, Ap. 231.)

The evidence and applicable law fully support the findings and conclusion of law of the District Court.

Howard F. Lauritzen, one of the appellees, who made the oral agreement with Ed. M. Foy, representing appellant, testified as follows:

"* * * Then I asked if the derrick barge was insured and he said it was fully covered by insurance. Then I said, 'Your $10 per hour includes the operator, fireman, oil, water, and the insurance?' And then he said, 'Yes'; and then I said, 'Well, that sounds all right.' * * *" (Ap. 170.)

"Q. On that occasion did you have a conversation with Mr. Foy and Mr. Darrah?

A. I did.

Q. Would you please state what was said?

A. After looking the thing over there, I talked to Mr. Foy about getting the derrick barge moved out of there. I believe he told me as soon as the insurance people were satisfied, he would move it, or they were going to move it. Then the question came up about our verbal agreement with Mr. Foy, which I went over there with him at the time about this agreement and about the insurance on the thing, that the thing that I wanted straight in my mind at the time was that our conversation over the phone was clear, so that the insurance companies wouldn't take subrogation and sue me on the thing, and at the time Mr. Darrah spoke up and said, I believe, 'that is the

agreement with Mr. Foy. You have nothing to worry about. Mr. Foy will live up to his contract.'

Q. What had you stated, if anything, as to the verbal agreement on the insurance?

A. Well, that he was to have it; and he was to carry insurance on the thing; he was to carry insurance on it. He was insured; that was included in the price of $10 an hour, the insurance." (Ap. 175.)

The cross-examination of Mr. Lauritzen on the issue of insurance is set forth in appellant's brief, pages 29-30, and likewise shows that the barge was insured and that it was agreed that the hourly charge would include the insurance.

It is not clear from the testimony of Mr. Ed. Foy whether or not he disputes the testimony of Mr. Lauritzen as to the agreement of appellant to keep the insurance in force and that the hourly charge included the insurance. Mr. Ed. Foy testified that, so far as he could now recall he said nothing about insurance on the barge except that appellant was "fully covered". (Ap. 84, 99-100, 109-110, 111.) Mr. Foy was definitely hazy in his recollection of various matters connected with the transaction. (Ap. 91, 108, 217.)

The trial Court who saw and heard both witnesses was required to determine whatever conflict there was in their testimony. Such conflict was determined in favor of appellees. (Finding III, Ap. 227.) Aside from the impressions formed by the trial Court from hearing and seeing the witnesses, there are a number of relevant additional circumstances which permitted the trial Court to resolve with certainty the conflict in the testimony.

Shortly after the fire, appellant sent appellee a bill dated May 21, 1941, the date of the fire, for the use of

the derrick barge. (Respondents' Ex. A; Ap. 88.) This bill contained the following note:

> "Derrick destroyed by fire 5:00 A.M. May 21st. Additional charge will be made for towing hull to Greenbrae when released by our insurance underwriters. This statement does not release your company from further liability of settlement in connection with loss due to the fire."

Appellee promptly returned such bill to appellant with a letter in which appellee set forth the substance of the oral contract for the services of the large. (Respondents' Ex. B, Ap. 89.) This letter, dated May 29, asserted that appellant had agreed to furnish, and the hourly charge of $10.00 included, an operator, fireman, water, fuel, oil and insurance. Appellee also asserted in the letter that "As your company agreed to carry the insurance we cannot assume any liability in connection with the fire."

Appellant made no reply to such letter. (Ap. 91.) But appellant did in effect confirm the statements contained in the letter. For, after receipt of the letter, appellant sent a new bill, without comment, to appellee for the use of the barge, but *omitted* from the new bill all reference to any alleged liability for damage due to the fire. (Respondents' Ex. C, Ap. 93, 171.)

Appellant, by its failure to challenge the statements contained in appellee's letter and by changing its bill to conform to such letter, certainly acquiesced with appellee's statement of the substance of the oral agreement as set out in such letter and also then acquiesced with appellee's position with respect to any claim of liability which might be asserted.

The letter referred to above was read to and by Mr. Foy while on the witness stand. First he testified that the letter correctly set forth the substance of the oral agreement. (Ap. 98.) Later, after a recess, on redirect examination, he denied that the carrying of insurance by appellant had been mentioned. (Ap. 109.) Still later he admitted that the hourly charge of $10.00 was to include insurance but stated that no mention was made as to whether the insurance covered appellee. (Ap. 110.)

Finally, appellant admits that Mr. Lauritzen inquired whether the barge was insured and that appellant replied that it was "fully covered." (Ap. 84.) It is not logical to believe that Mr. Lauritzen made such inquiry merely out of idle curiosity and then let the matter of insurance drop. He was obviously interested in protection, not mere information.

It is, of course, the province of the trial Court to determine the credibility and powers of recollection of the witnesses appearing before it.

Crowley Launch & T. Co. v. Wilmington Transp. Co., 117 F. (2d) 651, 653 (9 C.C.A.).

The determination of such matters by the trial Court should certainly be conclusive where, as here, the additional undisputed circumstances support the conclusion of the trial Court. The finding of the trial Court as to the terms of the oral agreement relating to insurance is, therefore, amply supported by the evidence. (Finding III, Ap. 227.)

However, appellant does not actually attack the sufficiency of the evidence to support the finding of the trial Court as to the provisions of the oral agreement relating

to insurance. Appellant, on the contrary, without any assignment of such alleged error, attacks the sufficiency of Finding No. VII to support Conclusion of Law No. IV. (Brief, pages 28-30.) The latter conclusion of law is, however, supported by and based upon Finding No. III which appellant does not discuss at all with respect to the issue of insurance. Appellant, then, does not dispute the sufficiency of the evidence to support the finding that:

> "Libelant agreed to furnish and to include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. Libelant stated that the said barge was fully insured and agreed to keep the barge fully insured." (Finding III, Ap. 227.)

The facts so found establish that appellant by such agreement as to insurance assumed the risk of loss to the barge by fire and other usual marine risks.

Thus in *Newport News Shipbuilding & Drydock Co., v. U. S.*, 34 F. (2d) 100 (4 C.C.A.), certiorari denied in 280 U.S. 599, 74 L. Ed. 645, the United States contracted with a shipyard for the repair of a vessel. The contract provided that the shipyard should hold the United States harmless against all losses, "provided, however, that the United States Lines will continue the present hull, machinery and equipment insurance upon the vessel * * *". The vessel was seriously damaged by fire due to the negligence of the shipyard. In denying recovery against the shipyard to the extent of the specified insurance, the Court said, pages 106, 107:

> "A careful examination of the circumstances leading up to and surrounding the making of the contract must lead to the conclusion that it was intended by

the parties that the United States assumed, by the insurance clause, the risk of loss by fire up to the amount of $2,000,000 and that this assumption of risk was not only for the benefit of the United States, but for the benefit of the shipyard also. To hold otherwise would be to hold that the agreement on the part of the United States to carry the 'present hull, machinery and equipment insurance' had absolutely no meaning whatever, and was of no value to the shipyard."

* * * * * * *

"To say that the meaning of the provision in the contract, as to insurance, was that the United States was only to protect itself, and to allow recovery from the shipyard for the total of the damages, would be to place the parties in the exact situation they would have been in without any provision whatever in the contract as to insurance. Something must have been intended by the parties when the insurance provision was written in the contract."

The contract in the present case is far more certain as to the assumption of the damage by fire by appellant than the contract in the above case. For, here, appellees admittedly did not agree to be responsible for and save appellant harmless against all losses. (Ap. 104.) Furthermore, appellant here did not merely agree to continue the insurance, but agreed that the hourly charge included insurance. In effect, therefore, appellee paid for the cost of the insurance.

In *The Barnstable,* 181 U.S. 464, 469, 45 L. Ed. 954, 958, the Supreme Court construed the effect of a clause in a charter which provided "that the owners shall pay for the insurance on the vessel". The charterer claimed that

such provision required the owner to take out special insurance covering collision liability. The Court held that the clause did not go that far, but did say, which is pertinent here, as follows:

> "It may be conceded, however, that for any damage to the vessel coverable by an ordinary policy of insurance 'on the vessel', the owners must look to the companies, at least for the insured porportion of such damage, and not to the charterers."

Again, the contract now involved is more favorable to appellants than the clause considered above, for appellant here was required to do more than merely pay for insurance. It agreed to carry insurance. Furthermore, appellant's barge was represented to be "fully covered" and appellant collected the insurance.

In *S. J. Brice & Sons v. Christiani & Nielsen,* 30 Lloyd's List Law Reports 177, a charterer of a derrick barge wrote to the owner: "It has been agreed between us that you insure the barge, crane, and gear against all risks, you to insure the barge to a reasonable value, and we to pay." The barge was damaged by the charterer's negligence, but in holding the charterer exempt from liability for the damage the Court said, page 179:

> "I find in this contract that the parties agreed with one another that the owners should insure against all risks at the expense of the hirer. It seems to me that that points most clearly to this: that the hirer stipulates that as regards risks he is not to be responsible for them; as regards risks the owner is to insure, and the hirer will pay for it. That is what I think it means. I think it indicates clearly—it is not well put, of course, it might be expanded—but it indi-

> cates quite clearly that the foundation of this clause is an arrangement that the hirer is to be free of risk and is not to take the risk, but he will pay for it being insured against, and that is what I think it means, and I think that there is no difficulty in that; it is a very common sense arrangement for these people to have made."

The above authorities clearly establish that appellant's agreement to furnish and include full insurance in the hourly charge for the services of the barge and to keep the barge insured, as stated in undisputed Finding No. III (Ap. 227) relieves appellee of any liability it may otherwise have had for damage to the barge by fire or other marine risk.

As stated above, appellant does not question the sufficiency of the evidence to support Finding No. III relating to insurance. (Ap. 227.) Appellant merely questions the sufficiency of Finding No. VII (Ap. 230) to support Conclusion of Law No. IV. (Ap. 231.) Since such conclusion of law was based on Finding No. III, appellant's contention completely collapses. Finding No. VII merely establishes the fact that the barge was fully insured and that appellant collected its full loss from the insurer, whereas Finding No. III sets forth appellant's agreement to furnish such insurance.

Appellant apparently hoped to distract the Court's attention from such pertinent finding by referring solely to Finding No. VII. For, appellant is well aware that appellee relies upon appellant's agreement to furnish insurance and not merely upon the fact that appellant

did in fact carry and collect insurance for the loss. (Respondents' Ex. B, Ap. 89.)

Appellant states that appellees have the burden of proof to establish that the insurance was for their benefit. (Brief, page 29.) This is not an accurate statement. Since appellant agreed to furnish full insurance, appellee would have been relieved of liability whether or not appellant did in fact provide such insurance. It is the agreement of appellant to furnish insurance, not the insurance itself, which relieves appellee of liability.

Newport News Shipbuilding & Drydock Co. v. U. S., 34 F. (2d) 100, 107 (4 C.C.A.);

S. J. Brice & Sons v. Christiani & Nielsen, 30 Lloyd's List Law Reports 177, 180.

Appellee did, as shown in the above discussion of the evidence and the findings of the Court, prove appellant's agreement to furnish insurance.

The three cases cited by appellant are not in point. *The Turret Crown*, 297 Fed. 766, involved the relationship of shipper and common carrier, so the latter could not validly contract either against its own negligence or *require* the shipper to procure insurance. The carrier's bill of lading contained a benefit of insurance clause which was wholly ineffective because such clause voided the shipper's insurance. The bill of lading clause was not an agreement to insure or to furnish insurance, but merely applied to such insurance as the shipper *might* have. Since there was no insurance, there could be no benefit.

Appellant also cites *Kennelly v. Frederick Starr Contracting Co.,* 250 Fed. 229 (2 C.C.A.) and White v. Upper Hudson Stone Co., 248 Fed. 893 (2 C.C.A.). In those cases, the vessel owner had insurance applicable within fixed geographical limits. The owner made no agreement whatever to furnish insurance, to keep it in force or to include it in the charter hire. However, the charterer there agreed that *if* he took the vessel outside the territorial limits fixed, he would pay for an extension of the policy to cover such additional limits. Obviously, since the owner had not agreed to carry any insurance, the charterer had no defense against the owner based on the insurance. If the charterer had desired to protect himself, he would have had to make such arrangement with the insurer, which he did not do.

Appellant states that the trial Court made no direct finding that the insurance was for the benefit of the appellees. The Court found the terms of the agreement and made therefrom the proper conclusion. As stated before, it would have been immaterial to appellee whether or not appellant did in fact procure insurance, for appellant agreed to insure and appellee is entitled to the benefit of such *agreement.*

Appellant certainly was not contracting for the privilege of being sued by an insurer instead of being sued by the barge owner. When appellant agreed to provide various items, an operator, fireman, water, fuel, oil and full *insurance* for a specified hourly charge to be paid by appellee, it certainly must have been intended that appellee was to receive the benefit of such items. One is ordinarily entitled to receive the benefit of that which it

is agreed to provide him for a price. Otherwise, the agreement between the parties as to insurance would, as stated in *Newport News Shipbuilding & Drydock Co. v. U. S.*, supra, be utterly meaningless.

> *Nicholson Transit Co. v. Nicholson-Universal S.S. Co.*, 43 F. (2d) 427, 432, affirmed in 60 F. (2d) 90, 92 (6 C.C.A.).

This action is, of course, prosecuted for the benefit of the insurer who paid appellant the loss under the policies. (Ap. 106.) The effect of the agreement between appellant and appellee as to insurance is not in any way dependent upon the consent or knowledge of the insurer as to the terms of the agreement.

For, as stated in *Nicholson Transit Co. v. Nicholson Universal S.S. Co.*, 60 Fed. (2d) 90, 91 (6 C.C.A.):

> "While insurers are subrogated to the rights of the insured, the issues are unaffected thereby. The underwriters' rights are purely derivative; they may assert all that but no more than libelant might have claimed."

Similarly, this Court said in *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F. (2d) 531, 538 (9 C.C.A.):

> "The practical effect of the agreement between the parties was to give the Motor Car Company the benefit of the fire insurance coverage of the owner of the gasoline launch during the short period necessary for the removal of one engine and the installation of another. It is true that the contract does not mention insurance but if, as seems likely, the parties had such insurance in mind, it is certainly an anomaly to permit the insurance company to recover from the Motor Car Company on the ground that the insured

had no right to make such a contract. However, we do not base our decision upon the fact that there was fire insurance in the case at bar."

Quite apart from the contract between the parties for insurance, it also appears that two of the three policies on the barge, produced by appellant, name appellant as the assured "for account of whom it may concern". (Respondents' Exhibits H, I & G, not printed.) If, as appellant contends, appellee was the demise charterer of the barge, appellee had an insurable interest in the barge. Appellee would, then, be entitled to recover the full amount of such policies, even if insurance had not been mentioned or provided for in the oral contract. Since the loss has been paid pursuant to the insurance policies, appellant may not recover against appellee either for itself or for the insurers.

In *The John Russel,* 68 F. (2d) 901 (2 C.C.A.), the owner of a barge chartered her to the State of New York and agreed to pay for insurance on cargo for "benefit of whoever it may concern." A policy was issued to the charterer and cargo owner as named assureds "for account of whom it may concern." The cargo was lost and the insurer paid to the cargo owner the amount of the loss. The cargo owner then sued the barge owner for the benefit of the insurer. The Court denied a recovery, stating, page 902:

> "Insurance carried for account of 'whom it may concern' covers anyone having an insurable interest in the insured property at the time of the happening of the loss. *Hogan v. Scottish Ins. Co.,* 186 U.S. 423, 46 L. Ed. 1229. It is not essential that the person

> covered by the insurance should be known to the one procuring the insurance or even to the underwriter at the time, if the insurance is carried for the account of 'whom it may concern.'."

The evidence and the applicable law, therefore, required the finding and conclusion of the trial Court that appellant's agreement to furnish and include full insurance in the hourly charge for the services of the barge was an assumption by appellant of the risk of loss to the barge from fire. The insurers, for whose benefit this action is prosecuted, are bound by appellant's agreement.

VII.

APPELLANT, HAVING AGREED TO FURNISH AND PAY THE CREW OF THE BARGE, WAS RESPONSIBLE FOR THEIR ACTS IN THE NORMAL OPERATION OF THE BARGE.

Appellant contends that the agreement for the use of the barge was a demise. (Brief, page 7.) Generally speaking, a demise transfers possession and control of a vessel to the charterer, i.e., a demise is in effect a bailment for hire. On the other hand, as found by the trial Court, where the owner retains possession and control of the vessel through his crew or otherwise, the contract is merely one to perform a service or for the use of the vessel. (Findings III and IV, Ap. 226-228.)

The Beaver, 219 Fed. 139, 140 (9 C.C.A.);
Hansen v. Dupont, 33 F. 2d 94, 95-96 (2 C.C.A.).

Appellant apparently hopes that if the contract constituted a demise, it can fasten liability by inference upon appellee for the damage to the barge. However, the law

is well settled that, even under a demise, the owner must prove that the damage resulted from negligence on the part of the charterer.

The Monongahela, 282 Fed. 17, 20 (9 C.C.A.);
Kohlsaat v. Parkersburg & Marietta Sand Co., 266 Fed. 283, 285 (4 C.C.A.);
Shamrock Towing Co. v. City of New York, 32 F. 2d 684, 685 (2 C.C.A.).

The damage to appellant's barge was admittedly due to fire. (Finding V, Ap. 228; Appellant's Brief, p. 3.) Appellant contends that the fire was due to negligence on the part of the fireman, Westall, in the ordinary course of his duties in getting steam on the barge's boiler. (Brief p. 16.) Under these circumstances, the important question is not whether or not the contract was a demise. The important question is whether appellant or appellee was responsible for Westall's actions, in event he was negligent.* For, appellant could be and was under the agreement responsible for Westall's actions, even if the agreement constituted a demise of the barge.

A. Appellant Agreed to Furnish the Crew For the Barge and Was Responsible For Their Actions in the Ordinary Operation of the Barge.

The findings of the Court on this point are as follows:

> "* * * Libelant agreed to furnish and to include in the hourly charge of $10.00 an operator, a fireman, water, fuel, oil and full insurance for the barge. * * *" (Finding III, Ap. 227.)

*We shall discuss later herein the evidence which amply supports the trial Court's finding that Westall was not negligent.

"On the 15th day of May, 1941, libelant pursuant to said oral agreement as aforesaid, towed said derrick barge from Oakland, California, to the place of respondent's construction work on the Napa River; that thereupon Libelant informed respondent that libelant was unable to furnish its operator and fireman to operate said barge and requested respondent to secure another operator and fireman to operate the barge for libelant and to deduct the wages of such operator and fireman from the hourly charge for the services of the barge. Respondent, pursuant to libelant's said request, did secure D. E. Williams and Adrian A. Westall to operate said barge as operator and fireman, respectively, for and on behalf of Libelant. Said D. E. Williams and Adrian A. Westall did operate said barge at said place on the 16th, 19th and 20th days of May, 1941, as operator and fireman for and on behalf of libelant. Respondent paid to said D. E. Williams and Adrian A. Westall the amount due to them for their services as operator and fireman on said barge as aforesaid and thereafter deducted as agreed with libelant, the amount so paid to said Williams and Westall from the amount due from respondent to libelant for the services of said barge. Said barge was at all times herein mentioned in the possession of libelant and the operation, maintenance and care of said barge was at all said times under the exclusive control and management of libelant." (Finding IV, Ap. 227-228.)

Such findings clearly establish that appellee had no responsibility for any negligence on the part of the fireman in the performance of his duties. The sole question is, therefore, whether the evidence supports the findings made by the trial Court. Upon this appeal appellant has

the burden and duty to demonstrate plain error in such findings.

Appellant, however, with great restraint, refers sparingly to the evidence. Reference is made only to the evidence favorable to appellant and such reference includes misstatements and unwarranted constructions of its plain meaning.

Mr. Lauritzen testified that appellant agreed to furnish a fireman and operator to operate the barge and that their wages were included in the hourly charge for the use of the barge. (Ap. 170, 172, 185, 186, 193.)

However, appellant subsequently informed Mr. Kitchen, appellee's job superintendent, that appellant could not furnish its regular operator or fireman to operate the barge and requested appellee to get another operator and fireman to operate the barge for appellant. These facts appear from the testimony of Mr. Lauritzen and Mr. Kitchen. (Ap. 172, 185, 186, 198-199.)

Appellant does not really dispute the foregoing testimony. Its witnesses in fact support appellee's testimony. Mr. Ed. Foy, general manager of appellant, who made the oral agreement for the use of the barge with Mr. Lauritzen, testified that while he could not furnish a crew, he told Mr. Lauritzen to furnish the crew and charge their wages back to appellant. (Ap. 84-85.) Mr. Foy also admitted that the hourly charge to appellee for the use of the barge included the operator and fireman. (Ap. 110.) There is no dispute about the fact that appellee did pay the operator and fireman's wages directly and then charged the amount thereof back to appellant. (Ap. 101, 172.) There was, of course, no reason for including the

wages of the crew in the hourly charge unless appellant had agreed to furnish a crew. Appellant was unable to offer any other rational explanation for such procedure. (Ap. 101.)

Mr. Ralph Foy, appellant's superintendent of equipment, testified that he was on hand to take care of the barge when it first arrived at the scene of appellee's construction job. (Ap. 222.) He testified that he then informed Mr. Kitchen that appellant would not be able to furnish a crew and that appellee would have to get the crew. (Ap. 148, 220.) It is perfectly obvious that Mr. Foy would not have appeared when the barge reached the job, *after the agreement had been made,* to tell appellee that he had no crew and request appellee to secure a crew, unless appellant had in fact, as the trial Court found, agreed to furnish the crew. In fact, Mr. Foy was pretty hazy about the whole matter, as the Court below said. (Ap. 148-149, 219.) But Foy's actions in arriving "to take care of it" and in actually firing up the boiler, show that he then recognized appellant's obligation under the agreement. (Ap. 222.)

We have previously pointed out that appellant did not dispute the terms of the oral agreement as set forth in appellee's letter to appellant shortly after the fire had occurred. (Respondents' Ex. B, Ap. 89.) On the contrary, appellant by its actions acquiesced in the statements contained in such letter, supra, pages 12-13.

The evidence thus thoroughly supports the finding of the trial Court that appellant agreed to furnish an operator and fireman to operate the barge and that their wages were included in the hourly charge for the use of the barge.

Appellant was, therefore, responsible for the acts of the operator and fireman in the ordinary care and operation of the barge, even if the agreement constituted a demise charter.

Thus, in *Hastorf v. F. R. Long-W. G. Broadhurst Co.,* 239 Fed. 852, 854 (2 C.C.A.), involving a demise charter of a scow, the Court said:

> "Between the owner and the charterer in case of such boats, the former is liable for any injury to the boat by reason of the negligence of her master in caring for her."

Similarly, in *Daily v. Carroll,* 248 Fed. 466 (2 C.C.A.), a frequently cited case, Judge Hough held that a bargeman furnished along with a barge under a demise charter was acting for the owner of the barge in the care and ordinary operation of the barge.

In *Dennis v. Roberts,* 19 F. 2d 1, 2 (9 C.C.A.), this Court recognized the same rule, stating:

> "At most the owner assumed the risk of loss resulting from a failure on the part of Nations to exercise ordinary skill and care in performing work ordered by appellant, but upon the latter rested the risk of extraordinary hazards inhering in the task he imposed."

In *The Trenton,* 72 F. 2d 283, 286 (2 C.C.A.), another case of a demise charter, the Court said:

> "Yet, as between the owner and the charterer of the Trenton, the owner is liable for any damage caused not only to the Trenton, but by the Trenton, because of the negligence of her master in caring for her after she was moored."

The same rule has been repeatedly stated:

Tucker v. Reading Co., 127 F. 2d 527, 528 (2 C.C.A.);

The Junior, 279 Fed. 407, 408 (2 C.C.A.);

Donovan v. New York Trap Rock Co., 271 Fed. 308, 309 (2 C.C.A.);

The Cary Brick Co. No. 8, 34 F. 2d 981, 983 (S.D. N.Y.);

The Raymond M. White, 290 Fed. 454, 457 (E.D. N.Y. affirmed 296 Fed. 1023).

The fact that appellee secured the fireman and operator and paid them in the first instance at the request of and for appellant, when the latter failed to furnish its regular crew as agreed, does not alter the rule. Under the agreement appellant had the obligation to furnish the crew and the responsibility for their actions flows from that obligation regardless of the source from which the crew was obtained.

In *The Peerless,* 282 Fed. 1000 (affirmed 282 Fed. 1004), where an owner sued a charterer for loss of a barge held under a demise, Judge Learned Hand said, page 1002:

> "First, as to the dispute between the libelant (owner) and the charterer: Mr. Purdy does not question under the charter that the bargeman was the agent of the libelant when originally hired. I think it equally plain that the substituted bargemen, including Murray, who was on board when the accident happened, were also the agents of the owner. It is true that the charterer chose him, but he chose him with the consent of the libelant, and in accordance with a practice of some standing whenever an occasion arose, and it is quite clear that no other system was possible, considering how transitory is the em-

ployment of these men, and the fact that they might leave wherever a barge happened to be. Unless the charterer had the right to substitute a bargeman, his use of the barge would be much limited. This the libelant recognized, and clearly consented to substitution at the choice of the charterer, by continuing to pay the wages of those so chosen.

"In this view the charterer's duties extended to no more than reasonable care in the selection of a competent man, and there is no just ground to challenge the selection of the charterer in this particular case. Individually, neither the libelant nor the charterer is at fault for the fault of Murray, but, as Murray was in law the agent of the libelant, his fault is by law charged against him. Therefore the charterer appears to me to have made a good excuse for his failure to return the barge, and against him I dismiss the libel."

The same conclusion was reached in *The Volund,* 181 Fed. 643 (2 C.C.A.), where a supercargo and pilot employed by the charterer and on board the vessel on behalf of the charterer was temporarily entrusted with the navigation of the vessel by the owner's master, the Court held that the charterer had no liability for a collision occurring while the charterer's supercargo was navigating the vessel. The Court said, pages 666-667:

"Since the navigation remains in the hands of the owner, all instrumentalities (human or otherwise) which he uses to conduct it are his own while thus employed, no matter from what source he obtains them. We have no question here as to navigation in waters where the law compels the employment of some local pilot. For the consequences which may result from the failure of any of these instrumen-

talities properly to do the work the owner who is employing them may be liable; he cannot escape liability for damages done by his vessel in consequence of her being improperly navigated because the person in fault was temporarily assigned by someone else to assist him in doing the work which was distinctively his own." * * *

"Nor are we persuaded that, although the Higginson Company (charterer) selected Nelson as its supercargo and paid his salary, it remained his responsible employer when he was engaged in the operation of navigating the vessel for the shipowners, especially since, as we construe the charter, the master need not have allowed him to conduct the navigation unless he was satisfied to entrust it to him, and if dissatisfied could have removed him."

Likewise in *The Arizonan,* 136 Fed. 1016 (E.D.N.Y.; reversed on other grounds in 144 Fed. 81), the Court said, page 1017:

"In the case at bar the owner agreed to furnish the charterer 'with the services of the tugboat * * * fully manned and equipped', and paid the members of the crew for their services. They were the servants of the owner. The fact that the owner selected them, in whole or in part, from the charterer's night crew, did not change the legal relation."

1. Appellant Had and Exercised Full Control Over the Crew in the Ordinary Operation of the Barge.

In addition to the obligation to furnish the crew assumed by appellant under the contract, the evidence shows without conflict that fireman Westall did in fact receive all his directions and instructions as to manner of performing his work from appellant.

Mr. Lauritzen testified that he told fireman Westall to go and work for Mr. Foy on the Foy derrick barge. (Ap. 172, 186.) He further testified that he did not at any time give Westall any orders as to the operation of the barge. (Ap. 173.)

Mr. Kitchen testified that Foy was to instruct the operator and fireman secured for appellant by appellee, so that they could carry out their duties to Foy's satisfaction. (Ap. 199.)

Mr. Ralph Foy, appellant's superintendent, testified that he showed Westall how to start the fire, get up steam, operate the valves, and in general, the duties of a fireman on that particular barge. (Ap. 133, 141, 148.)

Westall, the fireman, testified that he received all his directions and instructions as to the manner of performing his duties from appellant's employees. (Ap. 44-45, 50, 69.) It also appears that on the day following the fire, appellant's attorney took Westall's statement of the accident. (Ap. 210.) Certainly appellant would not have considered itself at liberty to take the statement of Westall unless appellant considered him to be its employee.

The J. L. Luckenbach, 1 F.S. 692, 694 (S.D.N.Y.).

It, therefore, appears that appellant did in fact instruct and direct the fireman in his duties in the firing of the boiler and its care in accord with appellant's obligation under the agreement.

Appellant, without mentioning the foregoing testimony, argues that appellee had the direction and control of the fireman and states that the fact that appellant "secured" the fireman would not be decisive. (Brief pp.

13-14.) However, the cases cited above show that appellant was responsible for the fireman's actions in the normal operation of the barge, even if the agreement was a demise so as to give appellee possession and control of the barge.

The evidence referred to by appellant in this connection certainly does not place any responsibility upon appellee for the fireman's actions. Appellant refers to Westall's testimony that he was working for appellee at the time of the fire. But Westall was not aware of the terms of the agreement between appellant and appellee and he was not aware of the legal effect of that agreement nor could he change its effect. Westall was told that Foy would show him how to operate the barge. (Ap. 69.)

Harbor Towboat Co. v. Lowe, 47 F. Supp. 454, 457 (N.D.N.Y.).

Appellant states that appellee told Westall when to come and fire the boiler and when to quit. True, but that right was inherent in the agreement, as even Mr. Ed. Foy recognized. (Ap. 84.) A charterer, whether the charter be a demise or a contract for services, may direct when and where the vessel is to operate.

The Beaver, 219 Fed. 139, 141-142 (9 C.C.A.).

Appellant also states that appellee paid Westall. We do not know why appellant mentions that fact. Appellee did pay Westall directly but was repaid by appellant in accord with their agreement. (Respondents' Ex. D, Ap. 94, 172.) So, appellant did finally pay Westall's wages as it had admittedly agreed to do. (Ap. 85.) No change in

the contractual relation between the parties arose from such dealings.

The Peerless, 282 Fed. 1000, 1002 (S.D.N.Y.);
Harbor Towboat Co. v. Lowe, 47 F. Supp. 454, 456 (N.D.N.Y.).

Appellant overlooks or seeks to evade the fact that its responsibility for the actions of the fireman in performing his ordinary duties arises from its agreement to furnish and pay a crew to operate the barge. There is no pretense or claim by appellant that the damage to the barge arose from any order or direction given to the fireman by appellee. Appellant simply claims that Westall was negligent in performing his ordinary duties as a fireman in firing the boiler. (Brief pp. 19-20.) Appellee, under the numerous authorities cited above, pages 28-29, has no responsibility for such alleged negligence even under a demise charter.

B. Appellee Did Not Have Possession, Control or Management of the Barge.

Appellant towed the barge to appellee's job and also towed it away after the fire. (Ap. 85, 170.) After the barge reached the place of work, its position for working was practically stationary except for the effect of the tides. (Ap. 168, 198.) Nevertheless, appellant contends that the evidence shows that appellee had possession, control and management of the barge. (Brief pp. 10-12.) This point is immaterial since, as just discussed above, appellant was in any event responsible for the acts of the fireman in performing his normal duties.

However, the evidence does not support appellant's contention. Appellant argues that the provision of the

agreement that the rate of $10.00 per hour would be charged only for each hour the barge actually worked, with a minimum charge for four hours on any day the barge was "fired up", necessarily vested complete dominion over the barge in appellee. Appellant's theory is that, by such arrangement, appellee alone could say when and how long the barge would work. Such argument is, of course, a palpable *non sequitur*. At the most it merely demonstrates that appellant made a bad bargain.

However, appellant apparently knew the need for the barge's services, the work to be done, and could estimate the expected financial return. (Ap. 151.) The very fact that appellee was to pay $10.00 per hour only for each hour of actual use indicates definitely a contract for the services of the barge. If appellant had intended to turn over complete dominion of the barge to appellee, then appellant would certainly have demanded an hourly or daily minimum charge while appellee had the barge whether the barge was used or not. A demise is invariably predicated on a flat charge for a daily, monthly or other period of time.

But even a time charterer, who admittedly does not have control, management or possession of a vessel, nevertheless has the right to determine when, where and how long a vessel shall work. The exercise of such rights by a charterer does not establish nor indicate any control or right to control the manner in which the crew of a vessel shall operate or care for her and does not make the charterer liable for their acts in the normal operation of the vessel.

The Volund, 181 Fed. 643, 666 (2 C.C.A.);
The Beaver, 219 Fed. 139, 141 (9 C.C.A.).

Appellant also states that appellee overhauled the barge equipment. The testimony does not warrant such statement. Appellee did do some work so that the winch drums would operate safely. (Ap. 202.) Appellee had no obligation nor responsibility to do such work, since appellant warranted the good working condition of the barge, irrespective of whether the contract was a demise or a contract for services.

Patton Tully Transp. Co. v. Barrett, 37 F. 2d 516, 521 (6 C.C.A.);

Work v. Leathers, 97 U.S. 379, 380, 24 L. Ed. 1012, 1013.

Appellant, having warranted the good working condition of the barge, was liable to reimburse appellee for the value of such work. (Ap. 170.)

Aktieselskabet Stovangeren v. Hubbard-Z S.S. Co., 250 Fed. 67, 70 (5 C.C.A.).

Hence the fact that appellee did some work on certain equipment of the barge, so that it could commence work, instead of waiting and notifying appellant to do such work, does not indicate that appellee had possession, control or management of the barge. It shows merely a right in appellee to recover from the appellant the value of such services.

Appellant also asserts that appellee kept a foreman on board the barge "to tell the men what to do". There is no such testimony in the record. Mr. Kitchen testified that he told the foreman "on the job" what to do. (Ap. 214.) The "job" was the construction of a sewer "across the mud flats". (Ap. 168.) The men referred to were working on that job. They were not operating the barge,

as appellant would apparently seek to infer by its inadequate and inaccurate reference to the record. The operator and fireman operated the barge. Appellee's men worked on the construction job ashore, under and around the boom of the derrick barge. (Ap. 202.) Naturally, some of these men were on and off the barge during the course of their work. (Ap. 215.) But that fact does not show that appellee had possession, control or management of the barge. It is not claimed that any of these men damaged the barge.

Appellee was entitled under a contract for the services of the barge to the exclusive use of the whole barge, without thereby assuming any responsibility for the operation of the vessel.

The Beaver, 219 Fed. 139, 141 (9 C.C.A.);
The Arizonan, 136 Fed. 1016, 1017 (E.D.N.Y., reversed on other grounds, 144 Fed. 81).

Appellee's men were, therefore, entitled to go on and off the barge in performing their work and in so doing they obviously did not subject appellee to any liability for damage alleged to be due to the actions of the fireman in performing his duties.

C. The Contract Between the Parties Did Not Constitute a Demise of the Barge.

Appellant's major contention is that the contract between the parties was a demise and that hence appellee had possession and control of the barge. (Brief p. 8.) We have already pointed out that it is not important whether the contract was a demise or contract for services, since appellee has no liability in either event for

damage to the barge arising from the alleged negligence of the crew which appellant agreed to furnish.

Appellant carefully refrains from discussing the terms of the contract here involved, but relies upon the general rule that a charter of a barge without motive power, even though accompanied by the owner's crew, is a demise. Such rule is, however, based on the fact that such barges must be towed to be used and are essentially subject to the control of the tugs which tow them. (*Ira S. Bushey & Sons v. W. E. Hedges & Co.,* 40 F. 2d 417, 418.) But, in the present instance, such reason does not obtain. The barge was towed by appellant to and from the place of appellee's construction job. (Ap. 85, 170.) The barge was not used for hauling while in tow of a tug. The barge was moored at the site of the construction work and its derrick, operated by the barge's equipment, was used to lift and place materials and equipment. (Ap. 202, 214.) Hence the only operation or use of the barge was in the hands of its crew, the fireman and operator. The situation was no different than where a vessel having motive power is navigated by her own crew.

Under these circumstances the reason for the rule relied upon by appellant ceases. None of the decisions cited by appellant refers to derrick barges so employed. However, in *S. J. Brice & Sons v. Christiani & Nielsen,* 30 Lloyd's List Law Reports 177, 178, the Court, in determining the effect of an agreement for the use of a derrick barge and its crew, said:

> "The defendants did not obtain possession as hirers simpliciter of this crane barge. They hired its services; it came under the service of the plaintiffs, and they found its wages, and the management of the

crane and the movement of the barge was under the control of its owners all the time."

The same holding was made with respect to a pump dredge in *North American Dredging Co. v. McAllister Steamboat Co.,* 202 Fed. 181, 183 (2 C.C.A.).

There is a general presumption that a charter of a vessel is not a demise, unless the language of the contract necessarily requires such a construction.

The Beaver, 219 Fed. 139, 141 (9 C.C.A.);

Hansen v. Dupont, 33 F. 2d 94, 96 (2 C.C.A.).

We do not believe that appellant will dispute that, except for the rule as to barges without motive power referred to above, the contract between the parties, as found by the trial Court, constituted a contract for services and not a demise. (Finding III, Ap. 226.)

Hansen v. Dupont, supra, at pages 95-96.

The contract was clearly for work or service to be performed. (Ap. 170.) Appellant billed appellee for "work done for your company". (Respondents' Ex. E, Ap. 96.) Appellant was to furnish and pay the crew and all operating supplies. (Ap. 170.) Under these circumstances, no demise was created. The barge was, therefore, in the possession and control of appellant through its crew. Appellant apparently concedes, as it must, that it can have no basis whatever for recovery unless the contract was a demise.

VIII.

THE DAMAGE TO THE BARGE WAS NOT CAUSED BY NEGLIGENCE ON THE PART OF THE FIREMAN BUT WAS DUE TO THE FAILURE OF THE EQUIPMENT OF THE BARGE TO FUNCTION PROPERLY OR TO DEFECTIVE FUEL OIL.

Appellant, of course, had the burden of proof to prove that the damage to the barge was caused by negligence on the part of appellee.

The Monongahela, 282 Fed. 17, 20 (9 C.C.A.);
Shamrock Towing Co. v. City of New York, 32 F. 2d 684, 685 (2 C.C.A.);
Kohlsaat v. Parkersburg & Marietta Sand Co., 266 Fed. 283, 285 (4 C.C.A.);
Commercial Molasses Corp. v. New York T.B. Corp., 314 U.S. 104, 110, 114, 86 L. Ed. 89, 95, 98.

The damage was admittedly caused by fire. (Appellant's Brief p. 3; Finding V, Ap. 228.) Appellant contends that the fire was due to negligence on the part of Westall, the barge's fireman, in the course of his ordinary duty of firing up the boiler. (Brief p. 16.) Since, as just discussed, appellant was responsible for the actions of the fireman in such respect, it is clear that appellant failed in any event to establish any negligence on the part of appellee. However, the evidence also shows that the fire was not due to any negligence on the part of the fireman.

The trial Court found as follows (Finding V, Ap. 228-229):

> "On the 21st day of May, 1941, while said fireman Adrian A. Westall was engaged in the process of getting up steam on the boiler of said barge in the usual, customary manner in which said Westall

had been directed and instructed by libelant, a fire occurred on said barge; that all damage suffered by said barge while at place of respondent's construction work was due to and caused by said fire; that subsequent to said fire libelant towed said barge away from the place of respondent's construction work.

"While Fireman Westall was engaged in getting up steam on the boiler of the barge as aforesaid, an explosion occurred in the firebox of said boiler which caused fire or burning oil to be thrown from the firebox onto the deck of the barge's fireroom; said fire spread rapidly forward on the barge, causing damage to various parts of the barge and its equipment; that the deck of the fireroom of said barge was covered and caked with oil. Said explosion was due to and caused by the failure of the equipment of the barge to function properly or by reason of defective fuel oil; the fuel line leading to the firebox on said barge was not equipped with a strainer; the damage to said barge was not caused by nor contributed to in whole or in part, by any neglect or lack of care, or any improper act or failure to act, in any respect whatsoever on the part of fireman Westall, or on the part of respondents or any of them; fireman Westall exercised proper care and acted prudently in endeavoring to fight and extinguish said fire; fireman Westall was at all times herein mentioned a competent, experienced fireman and was not guilty of any neglect or lack of proper care at any time in the performance of his duties as fireman on said barge; that each and every allegation of negligence set forth in paragraphs XII and XIII of the libel herein is untrue."

The evidence amply supports the above finding of the trial Court. Any other finding would have been pure conjecture.

A. Westall, the Fireman, Was Not Negligent.

No complaint is made of the manner in which Westall fired up the boiler. (Appellant's Brief pp. 19-20.) He started the fire in the boiler firebox in the manner in which he had been instructed by Ralph Foy, appellant's marine superintendent. (Ap. 47-48, 59, 132-133.) Foy admitted that Westall appeared to be a competent fireman and was satisfied that he could operate the barge. (Ap. 134, 150, 166.)

The only claim appellant makes is that Westall was negligent in leaving the firebox for several minutes while he stepped out on deck to urinate. (Brief pp. 19-20.)

The boiler on this particular barge was an old type of logging boiler designed to burn wood or coal. (Ap. 115.) It had been converted to burn crude fuel oil, but before the crude oil could be used, sufficient steam had to be generated to atomize the oil. To generate sufficient steam for this purpose, diesel oil, atomized by compressed air was burned until there was about 40 pounds steam pressure which took about 40 minutes, referred to as the "generating" period. (Ap. 210-212.) The diesel oil flowed by gravity from a ten-gallon open barrel through a hose to the firebox. A small air compressor run by a little gas engine supplied the air pressure during the period. (Ap. 56, 62, 201, 210.) This system was admitted by one of appellant's expert witnesses to be a makeshift arrangement for firing a boiler. (Ap. 114, 115.) Mr. Lauritzen, who owns derrick and pile driver barges, testified that such a system of firing a boiler was not usual. (Ap. 179.)

Appellant does not, of course, contend that there was anything inherently dangerous in such a system of firing

a boiler. (Ap. 138.) The contention is that the fireman should remain at the firebox during the generating period because something *might* happen. (Ap. 159.) Such contention is fundamentally unsound because nothing should happen to cause the fire to go out, or to cause an explosion if the fuel is clean and the equipment is in good operating condition. (Ap. 174, 206.)

Appellee was not required to anticipate such failure of equipment.

Patton-Tully Transp. Co. v. Barrett, 37 F. 2d 516, 521-22 (6 C.C.A.).

Appellant refers to the testimony of Westall given on his deposition that it is better practice not to leave the boiler while it is generating. (Brief p. 21.) It is significant that the statement of Westall, taken down in the handwriting of appellant's attorney on the day after the fire contains no such implication. (Ap. 210-213.) Furthermore, appellant refers only to selected bits of Westall's testimony. He also testified that it was not the fireman's job to remain at the firebox all the time, that he had other jobs to do and could leave the fire when he was satisfied that it was burning satisfactorily. (Ap. 63.) He said that he had watched it for some time and was satisfied that it was operating properly before he went to the toilet on this occasion. (Ap. 59.)

Appellant states that two other witnesses called by it testified that the fireman should stay close to the fire while generating steam. (Brief p. 22.) However, neither of these witnesses testified that a fireman had to remain right at the firebox. Thomas Smith testified that there was no objection to a fireman going 30 or 40 feet away from the firebox if he were in sight of it. (Ap. 114.)

Henry Foss testified that there was no particular reason to watch the firebox, but that the fireman should remain in the vicinity of the boiler. (Ap. 121.) He also said that if the fireman could see what is going on he could safely be 30 or 40 feet away. (Ap. 122.)

Mr. Lauritzen testified that he had owned a derrick barge for ten years and had been around barge boilers for many years. (Ap. 173.) He said there was no necessity for remaining constantly at the boiler if the equipment is in good condition. (Ap. 174.) Mr. Kitchen, who had years of experience in operating barges with vertical boilers, testified that there was no need for a fireman to remain constantly at the firebox after lighting the fire. (Ap. 204.) He stated that a fieman was close enough if he were in sight of the boiler stack. (Ap. 208-209.) Ralph Foy, appellant's marine superintendent, admitted that an experienced fireman could tell by looking at the stack what was going on within the firebox and that the stack could be seen from almost any place on the barge. (Ap. 153.)

Now where was Westall for the several minutes he left the firebox "to go to the toilet"? When Westall's deposition was taken, he stated that he was "subjected to a call to the toilet". (Ap. 47.) There was a toilet in the house on the stern of the barge and appellant assumes that Westall went into that house. (Ap. 119, 131.) However, when Westall's statement was taken by appellant the day after the fire he stated merely that "I stepped out on deck to urinate". (Ap. 211.) The Court may well take judicial notice that Westall's statement accords with the well known customs of bargemen, particularly since he was gone only two or three minutes. (Ap. 60, 211.)

Westall's reference to a toilet in his deposition, taken more than two years after the fire, was, we believe, a concession to modesty induced by the formality of the occasion. In any event, the crew's quarters were locked. (Ap. 204.)

While he was out on deck Westall could see the boiler stack and thus observe at all times the operation of the firebox. The evidence does not, therefore, indicate any negligence on the part of Westall in stepping out on deck for several minutes, whether credence be given to the testimony of appellant's or appellee's witnesses.

Furthermore, at the time Ralph Foy instructed Westall in the operation of the barge, Foy did not, either by word or example, inform Westall that it was necessary for the fireman on this particular barge to remain in constant attendance before the firebox. (Ap. 51-52, 158.) At the time Foy showed Westall his duties and after the fire had been started in the firebox, Foy took Westall around the barge and showed him other duties to do during the so-called "generating" period. (Ap. 73.) It is strange indeed that Westall should now be accused of negligence for stepping out on the deck for several minutes, although Foy himself took Westall away from the firebox for a longer period of time while giving him his instructions. It would seem that appellant is now trying to apply a hindsight rule of special caution merely because something happened which should not have happened if the equipment had functioned properly.

Appellant's principal contention now is that Westall violated a safety order of the Industrial Accident Commission of the State of California and hence was negli-

gent. (Brief p. 22.) Such rule set out in appellant's brief is not applicable and was not violated for a number of reasons.

First of all, the rule is by its own terms not applicable to appellant's barge. The safety order referred to is one of a number of "Boiler Safety Orders" issued by the California Industrial Accident Commission. (Libelant's Exhibit No. 4, not printed.) These orders (p. 10) provide that they are applicable to various boilers, except: "1. Boilers under the jurisdiction or inspection of the United States Government". The barge in question was admittedly within the admiralty jurisdiction of the United States. (Appellant's Brief pp. 1-2.) There is here no question involved as to whether the State of California could take jurisdiction over the barge's boiler. For, the state safety orders expressly exclude any application where the United States has jurisdiction, not merely where the United States has exclusive jurisdiction. Hence the rule was not applicable to appellant's barge.

Second, the rule applies only to attendance on a boiler "while in active service". Active service is defined as that "portion of time when the main stop valve is open and the fires are burning". Appellant made no showing that the main stop valve was open when Westall stepped out on deck. Obviously, the main stop valve, which is the main outlet for steam from the boiler to the various operating machinery, was not open during the "generating" period. The rule, therefore, that appellant relies upon, while not applicable here at all, recognizes that the generating period is not the dangerous period from the standpoint of safety, but that the time for caution is

after the boiler has a full head of steam. The very rule, then, that appellant cites is itself a refutation of the claim that Westall was negligent.

Third, the rule states that a boiler shall not be left "unattended", but it does not state that a fireman must idly stand and constantly watch the firebox. The rule was certainly intended to be reasonable. Surely, if a fireman is on the barge where the boiler is located and is only 30 feet from the firebox, the boiler is not "unattended". (Ap. 60.) The reference in the rule to automatic control indicates that by "unattended" is meant leaving a boiler for long periods of time.

The trial Court was, on the whole evidence, manifestly correct in concluding that Westall was not negligent in leaving the firebox for several minutes.

Since the damage to the barge was admittedly caused by fire, appellee discharged any burden of explaining the loss which it may have had. Appellee did not have such burden at all unless the contract between the parties was first shown to be a demise. However, proof that the cause of damage was fire in the normal operation of the barge exonerated appellee from liability in the absence of affirmative proof of its negligence.

Thus in *Southern Railway Co. v. Prescott,* 240 U.S. 632, 640, 60 L. Ed. 836, 840, the Supreme Court said:

> "The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of a warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due

> to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence."

In *Shamrock Towing Co. v. City of New York,* 32 F. 2d 684, 685 (2 C.C.A.), an action by the owner of a barge against a demise charterer for damage to the barge, the Court said:

> "Mere proof that fire occurred is not sufficient upon which to base negligence. The appellee failed to sustain the burden it had of establishing the cause of the fire and that such cause was a negligent one, for which appellant was responsible."

In *The Monongahela,* 282 Fed. 17, 21 (9 C.C.A.), a case involving the sinking of a barge under demise, this Court said:

> "True, it cannot be said with entire satisfaction that the Board established what was the definite, precise cause for the leaking and capsizing of the barge. Yet there was sufficient evidence for the judge to draw the inference that the charterer was not negligent. It might have been one of several things, or a combination of things. * * *"

> "Granting, however, as we do, that there is uncertainty in respect to which of the several conditions was the proximate cause of the loss, still the defendant's evidence, when considered with plaintiff's, left the case in equipoise—a situation where, considering the whole evidence upon the issue of negligence, the Crowley Company, as the affirming party, must fail. * * *."

To the same effect are:

O'Brien Bros. v. City of New York, 7 F. 2d 485, 487 (E.D.N.Y., affirmed 7 F. 2d 488);

C. F. Harms Co. v. Turner Const. Co., 290 Fed. 612, 613 (E.D.N.Y., affirmed 3 F. 2d 591).

Appellant failed to prove that the fire was due to negligence either on the part of Westall, or on the part of appellee, but the evidence does show that the fire was caused by the unseaworthiness of the barge's equipment.

B. The Fire and Resulting Damage to the Barge Was Due to the Failure of the Equipment to Function Properly or to Defective Fuel Oil.

Westall testified that he had watched the firebox for some time and was satisfied that it was operating properly before he stepped out on deck. (Ap. 59.) He stated that several minutes later while on his way back to the firebox, he heard an explosion and hurried back to find fire burning on the deck around the firebox. (Ap. 49, 50-60.)

The explanation offered by Westall for the explosion was that the diesel oil, fed by gravity, had, due to some obstruction or air bubble in the fuel line, temporarily ceased to flow; that when the oil started to flow again the heat of the firebox caused gases which ignited and the resulting explosion threw burning oil onto the oil-soaked deck of the fireroom. (Ap. 51-52, 210-212.) This also seemed to be the theory of Ralph Foy and Henry Foss, other witnesses called by appellant. (Ap. 121, 158-159.)

There was nothing done or undone by Westall which stopped the flow of the fuel oil, so his alleged non-attendance at the firebox was not the proximate cause of the explosion and ensuing fire. The stoppage of the fuel flow may, according to Westall, have been due to an air bubble in the line, water in the fuel, or dirt in the line. (Ap. 52, 63, 64.) Henry Foss said that the fire might go out for different reasons or foreign substances in the fuel might cause an explosion.

Mr. Lauritzen stated that a plug in the line, dirty fuel or a poor connection in the line would cause the fire to go out. (Ap. 182.)

Ralph Foy stated that rope yarn might get into the fuel tank, or dust might get into the fuel, or a lot of things can happen to the fuel. (Ap. 159.)

Appellant furnished the fuel used on the barge and it also impliedly warranted the good working condition of the barge. (Ap. 105.) So everything which could have caused the stoppage of the fuel was due either to appellant's fault or the inherent nature of its equipment.

Appellant's barge was a very old one and it was not in good condition. (Ap. 104, 150.) The equipment for firing and operating the boiler was a makeshift affair. (Ap. 114, 115.) The diesel oil used for firing up was contained in an open tank or barrel. (Ap. 56-57.) The line between the diesel tank and the burner was partly a hose, although the line should have been made of metal. (Ap. 114, 116.) Diesel oil has a deleterious effect on fabric or rubber. (Ap. 114.) It may well be that bits of the hose, eaten away by the oil, or dirt got into the open fuel tank

and plugged the fuel line or burner. The fuel line contained no strainer. (Ap. 160.) A strainer was obviously necessary to keep dirt out of the burner. (Ap. 182.)

The West Arrow, 7 F. Supp. 827, 835, 80 F. 2d 853, 856 (2 C.C.A.).

If the line had been equipped with a strainer no dirt could have reached the burner and if the flow of fuel had been stopped at the strainer, the flow could not have resumed until the strainer were cleaned.

There was no drip pan beneath the firebox, so any escaping oil went onto the wooden deck. (Ap. 58.) The deck in the fireroom was oil caked and saturated. (Ap. 57, 61, 64, 200-201.) The condition of the deck made it a fire hazard and the fire spread very rapidly. (Ap. 61.)

Westall tried to smother out the fire as soon as he discovered it, but it spread too rapidly. (Ap. 49, 60-61.) An effort was also made to use the bilge pump to extinguish the fire, but the pump would not start and the hose connected to it was too short. (Ap. 58-59, 203.)

While no one knows precisely what caused the fuel line to plug, it is fairly certain that the fuel did temporarily stop flowing and that the explosion occurred when the flow resumed. The proximate cause of the fire was, therefore, the failure of the barge's equipment to function properly or the condition of the fuel oil.

Appellant's discussion of the effect of unseaworthiness on its right to recover is not clear to appellee. (Brief pp. 24-25.) First, appellant states that there is a presumption of seaworthiness and the burden of showing unseaworthiness is upon the one asserting it. There is more than doubt as to the correctness of such contention, for appel-

lant overlooks that it warranted the good condition of the barge.

Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U.S. 199, 211, 38 L. Ed. 688, 692;

Underweser Reederi v. Potash Imp. Corp., 36 F. 2d 869, 870 (5 C.C.A.).

However, here the contention does not require any discussion because the very nature of the accident establishes the unseaworthiness of the barge's equipment.

Work v. Leathers, 97 U.S. 379, 380, 24 L. Ed. 1012, 1013;

Bartley v. Borough Development Co., 214 Fed. 296, 303 (E.D.N.Y.).

Appellant also states that appellee had an opportunity to examine the barge and hence waived its patent defects. Appellee did not examine and did not have an opportunity to examine the barge *before* the oral agreement was made. In any event we presume that appellant does not admit that the defective condition of the equipment was patent. The implied warranty of seaworthiness applies to defects patent as well as latent, unless the charterer has undertaken to inspect a vessel and does know of her defects *before* accepting her.

The Caledonia, 157 U.S. 124, 134, 39 L. Ed. 644, 647;

Patton-Tully Transp. Co. v. Barrett, 37 F. (2d) 516, 521 (6 C.C.A.);

Dempsey v. Downing, 11 F. (2d) 15, 17 (4 C.C.A.).

However, in this case such issue is not material. Appellant is either confused or seeking to confuse. For, the decision in *Frank Waterhouse v. Rock Island Alaska Mining Co.,* 97 Fed. 466, 476, cited by appellant, involved a

claim *by the charterer* against the owner for an allowance due to absence of certain appliances which claim was disallowed because the charterer had accepted the vessel knowing that she did not have such appliances.

It is too obvious for argument that a vessel owner cannot himself *recover* damages for injuries to his vessel arising from unseaworthiness (in breach of his warranty of seaworthiness), even if the charterer has inspected the vessel or expressly agreed to return her in good condition.

Patton-Tully Transp. Co. v. Barrett, 37 F. (2d) 516, 522 (6 C.C.A.).

It is submitted that Westall, the fireman, was not negligent, although appellee would not be responsible for his alleged negligence in any event, but that the evidence shows, as the trial Court found, that the damage was due to the failure of the barge's equipment to function properly or to the defective fuel oil supplied by appellant.

CONCLUSION.

It is submitted that the evidence and applicable law required the following conclusions of the trial Court:

1. Appellant assumed the risk of damage to its barge by fire by its agreement to keep the barge fully insured and to include the cost thereof in the charge for the services of the barge.

2. Appellant, having agreed to furnish and pay the crew of the barge, was responsible for their acts in the normal operation of the barge.

3. The damage to the barge was not due to negligence on the part of the fireman or on the part of appellee, but was due to the failure of the equipment of the barge to function properly or to defective fuel oil.

Any one of the above conclusions require an affirmance of the decree.

Dated, San Francisco, California,
October 30, 1944.

Respectfully submitted,
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